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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Communication No. 455/2011

Decision adopted by the Committee at its fifty-second session (28 April–23 May 2014)

Submitted by:	X.Q.L. (represented by counsel, John Clark of Balmain for Refugees)
Alleged victim:	The complainant
State party:	Australia
Date of complaint:	3 March 2011 (initial submission)
Date of decision:	2 May 2014
Subject matter:	Risk of deportation of complainant to China
Procedural issues:	
Substantive issues:	Deportation of a person to a country where she could be at risk of torture
Articles of the Convention:	3 and 22

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Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (fifty-second session)

concerning

Communication No. 455/2011

Submitted by:	X.Q.L. (represented by counsel, John Clark of Balmain for Refugees)
Alleged victim:	The complainant
State party:	Australia
Date of complaint:	3 March 2011 (initial submission)

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 2 May 2014,

Having concluded its consideration of communication No. 455/2011, submitted to the Committee against Torture by X.Q.L. under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention against Torture

1.1 The complainant is X.Q.L., a Chinese national, born on 8 October 1978, and residing in Australia. She claims that her deportation to China would constitute a violation by Australia of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The complainant is represented by counsel, John Clark of Balmain for Refugees

1.2 On 4 March 2011, in application of rule 108, paragraph 1, of its rules of procedure[1] the Committee asked the State party not to expel the complainant to China while her complaint was being considered by the Committee. The State party later informed the Committee that it would communicate to it any decision regarding removal of the complainant, which may be taken before the Committee issues its decision on admissibility and merits.

[1] This rule now appears as rule 114, paragraph 1, of the Committee's revised rules of procedure (CAT/C/3/Rev.5).

Facts as submitted by the complainant

2.1 The complainant was born in Fuqing in Fujian Province, China, on 8 October 1978. In January 2005 she started practicing Tien Tao religion after being introduction to it through a friend, J.P.H.

2.2 The complainant was approached by the police in February 2005 and questioned about her activities with Tien Tao. She was taken into police custody and at the police station she was beaten and asked to help the police arrest other members of the organization. As a result of the beating she suffered an injury to her left index finger, which was crushed.[2] She was released from police custody the following day. The complainant received medical treatment for her injury at 73301 Hospital in Fuqing.

2.3 In the days following the incident, the complainant was contacted by the police and requested to provide information about members of Tien Tao, including J.P.H. She was also forced to contact J.P.H. In April 2005, she fled to Chongqing, Bishang County, and hid at a friend's place. The police visited her family in Fujian on several occasions with a warrant for her arrest. Her family subsequently purchased a passport with a fake identity for her to leave China. She arrived in Australia on 19 April 2005 on a valid tourist visa.

2.4 Fearing that she and her family would be persecuted by the Chinese authorities if she returned to China, the complainant filed an application with the Australian Department of Immigration and Citizenship (Immigration Department) for a protection visa on 27 May 2005, using the same fake identity and claiming that she was a Falun Gong practitioner, as advised by the migration agent. On 18 August 2005, her application was refused. On 12 September 2005, she applied for review to the Refugee Review Tribunal (RRT), which upheld the refusal decision on 11 January 2006. The RRT decided that it could not verify her identity nor that she was a Tien Tao practitioner in China before her arrival in Australia. The complainant claims that due to the misguiding advice of the migration agent, she lost an opportunity to genuinely present her claims to the Australian authorities.

2.5 Her application for a judicial review by the Federal Magistrate Court as well as her appeal to the Federal Court were dismissed on 30 August 2006 and 23 February 2007, respectively. On 27 December 2007 and 30 November 2009, the complainant applied to the Minister for Migration to intervene; both applications were deemed not to meet the guidelines and were not referred to the Minister for consideration. The complainant claims that she has exhausted all domestic remedies.

2.6 The complainant joined a Tien Tao community in Sydney in August 2005 and claims to have been a regular practitioner since. There she met L.D.Z., who is the Master of the Tien Tao temple she attends. L.D.Z. visited the complainant's children during her trip to China in 2011, at the request of the complainant. L.D.Z. was subsequently stopped, harassed and threatened by the Chinese police, who questioned her about her relationship with the complainant.

The complaint

3.1 The complainant claims that her forcible deportation to China would amount to a violation of article 3 of the Convention as she fears being tortured by the Chinese authorities because of her continued involvement with the Tien Tao religion.

[2] The medical report describes the injury and the treatment recommended and states the following: "The patient was arrested by police when she attended a meeting. The police officer beat her with an electric baton, causing skin lacerations in the ending section of the index finger of the left hand and nail loss. The finger is bleeding and swollen, and cannot function normally".

3.2 The complainant also claims that the danger for Tien Tao practitioners in China is serious. To that end, she attached to her submission an RRT Research Response, dated 19 October 2007, concerning the situation and treatment of Tien Tao practitioners in China, particularly in Fujian.

State party's observations on admissibility and merits

4.1 On 29 June 2012, the State party submitted its observations on the admissibility and merits of the communication. The State party considers that the communication should be dismissed for lack of merit.

4.2 The State party outlines the facts of the case and describes the procedure followed by the complainant at the national level. It highlights that in the complainant's first application to the Immigration Department for a protection visa she used the false name, Mei Liu, and claimed that she feared being tortured by the Chinese authorities if she were deported because she was a Falun Gong practitioner. The Immigration Department rejected her application because it was not convinced that she had a well-founded fear of persecution for any of the Refugees Convention reasons nor was it persuaded that she had a significant leadership role in Falun Gong. It further indicated that the complainant would be able to practice her religion in her private life without interference. Furthermore, the fact that the complainant was able to leave China legally indicated that she was not of interest to the Chinese authorities.

4.3 Regarding the Refugee Review Tribunal (RRT), it could not verify the complainant's identity as she used different names and identity documents in her protection visa application and the RRT application. Furthermore, she claimed that she was a Tien Tao practitioner and withdrew her claim of being a Falun Gong practitioner. The RRT did not accept that the complainant's claim that she was a Tien Tao practitioner in China or that she was harassed by the police. It held that the complainant's engagement in Tien Tao activities in Sydney was solely for the purpose of strengthening her refugee claim.

4.4 Following the dismissal of her application for judicial review by the Federal Magistrate Court as well as of her appeal to the Federal Court of Australia, the complainant submitted applications for intervention by the Minister for Migration in 2007, 2009 and 2010. In her 2010 request, the complainant reiterated her claim that it is due to the misguiding advice she received from the migration agent that she was unable to genuinely substantiate her claim before the Immigration Department. The case officers concluded that there was no new credible information that would enhance the complainant's chances of making a successful protection visa application. In her last application to the Minister for Migration for intervention, dated 4 March 2011, she supported her claim with an uncertified photocopy of an untranslated Chinese document, which she claimed was the hospital report describing the injury to her left index finger that was inflicted by the police at a temple meeting. On 18 July 2011, the complainant's request was deemed not to meet the guidelines set out in sections 417 and 48B of the Migration Act, as they were the same claims as those submitted earlier to the RRT, which had concluded that there was no evidence to believe that the complainant was of interest to the Chinese authorities for practicing Tien Tao or for any other reason.

4.5 After outlining the legal framework of the complainant's application, the State party submits that the complainant did not provide sufficient evidence that she would be personally at risk of torture if deported to China. The photocopy of the medical report dated 17 February 2005 was examined by the Immigration Department in the context of the application for ministerial intervention, which was deemed not to sufficiently support the complainant's claim that she had been beaten by the police and finalized on 18 July 2011. The original document was not submitted to the Immigration Department, therefore its genuineness could not be determined. Fraudulent documents, including hospital documents,

are easy to obtain in certain countries. Lastly, the complainant chose to submit that document in 2011. Given the foregoing, the State party concludes that there are serious concerns about the genuineness of the document.

4.6 It submits that even if the document is genuine, there is no evidence that the injury to the complainant's finger was intentional or aimed at obtaining information about Tien Tao practitioners nor that the injury was due to torture, as defined under article 1 of the Convention.

4.7 Concerning the complainant's claim that during her visit to China, L.D.Z. had encountered harassment from the police about her relationship with the complainant, that claim was considered by the Immigration Department in May 2010 and found not to be credible as there was no evidence that the complainant was of interest to the Chinese authorities due to her religious beliefs. Despite the presumed senior role of L.D.Z. in the Tien Tao religion, the fact that she was able to enter and leave China without being subjected to torture indicates that the complainant, who does not hold a prominent role in the religion, would not risk being subjected to torture if deported to China.

4.8 The State party claims that the complainant's communication to the Committee does not contain any new information that was not examined during the domestic processes. The RRT considered and rejected her claim regarding persecution in China for practicing Tien Tao. It was not convinced that she had been persecuted, and it felt that her engagement in Tien Tao activities in Sydney was made solely for the purpose of strengthening her application before the Immigration Department. The Federal Court and the High Court upheld the decision of the RRT as no error of law was found. The State party recalls the Committee's practice not to question the evaluation of the evidence made in domestic processes.

4.9 The State party concludes that the complainant's claims that she would be at risk of torture if returned to China were found not credible by the Immigration Department and that there has been no material change in the complainant's circumstances since her last application for ministerial intervention in March 2011. Accordingly, in the absence of any credible evidence that the complainant would be at risk of torture, her deportation to China would not be in breach of article 3 of the Convention, and thus her claims should be dismissed for lack of merits.

4.10 On 28 February 2013, the State party provided the Committee with general information on the domestic processes it undertakes in assuming its non-refoulement obligations. It submits that in 2011 to 2012, it granted 7,083 protection visas to applicants in Australia; each applicant is carefully assessed in a robust determination process in line with Australian international protection obligations.

4.11 In 2012, new legislation came into force that provides additional protection in connection with Australia's non-refoulement obligations. The examination of a protection visa application consists of the following: first instance consideration by officers of the Immigration Department; review of the merits by the RRT; judicial review by Australian courts, including the Federal Magistrate Court, the Federal Court and the High Court. Finally, should the applicant not be successful in obtaining a protection visa, application for ministerial intervention may be pursued, whereby the Minister for Migration may intervene in favour of the applicant, if public interest so requires.

4.12 If after exhausting all domestic processes, Australia's protection obligation is not engaged, domestic law requires the removal of the person concerned from Australia as soon as reasonably practicable, and the person concerned is notified accordingly. Before facilitating the return of the person concerned, the State party undertakes a final pre-removal clearance process, in which it verifies that no new information has emerged that would engage its international protection obligation. The Office of the United Nations High

Commissioner for Refugees oversees and scrutinizes the removal process, which reinforces the integrity of the process.

Complainant's comments on the State party's observations

5.1 On 1 April 2013, the complainant submitted her comments on the State party's observations. With regard to the State party's claim that the original medical report was not submitted, the complainant refers to her counsel's letter to the Minister for Migration, dated 11 March 2011, to which a copy of the medical report was attached in support of her claim of fear of being tortured if returned to China, and in which it is indicated that the original document was available from the complainant at her place of detention (Villawood Immigration Detention Centre), should the Ministry wish to obtain it and that the hospital where she had been treated after the injury has a record of said treatment. The complainant claims that the State party made no effort to authenticate the document, despite her counsel's indication as to the availability of the original, and she questions the State party's genuine attempt to duly verify the evidence she provided. The complainant furthermore attached the original document with an accredited translation of the medical report to her comments. According to the translation, the complainant was beaten with an electric baton, she suffered skin lacerations in the ending section of her left index finger as well as nail loss, the wound was treated by debridement and stitches.

5.2 As to the State party's claim about the lack of sufficient evidence to substantiate her claim of fear of being tortured if returned to China, the complainant states that, although she had not provided the medical report to the Immigration Department during the protection visa application process, she had submitted it with her application for ministerial intervention to the Minister for Migration in 2011. Given that the State party did not attempt to investigate the authenticity of the document, its presumed fake nature is deceiving. She states that she did not submit the document earlier because she did not know that she could use it as evidence in furthering her case. It was only in 2011, after having been advised by counsel that she became aware of the importance of the document for her protection visa application.

5.3 Regarding the State party's claim about the lack of intention relating to the injury to her finger, the complainant states that the State party never attempted to clarify the matter with her directly. The State party also failed to interview L.D.Z. about her statement in favour of the complainant and it also erred in concluding that the complainant would not risk torture if returned to China because L.D.Z., who holds a prominent position within the Tien Tao organization in Sydney, was not tortured during her visit to China. She states that the Chinese authorities did know about L.D.Z.'s link to Tien Tao at the time she visited China.

5.4 The complainant attached to her comments a statement by L.D.Z., dated 31 January 2013. In the statement, L.D.Z. claims that she has known the complainant since August 2005 as a member of the Tien Ci Holy Dao Association. She states that at the complainant's request, she visited her children during a trip to China in January 2011. She claims that shortly after the visit, she was questioned by the Chinese police about her relationship with the complainant, who was referred to as the enemy of China because of her religious beliefs. L.D.Z. was warned not to approach the complainant's family again. L.D.Z. further states that the Chinese authorities were not aware of her link to Tien Tao religion.

5.5 Lastly, the complainant states that the RRT decision reflects a lack of knowledge about the treatment Tien Tao practitioners receive in China. If L.D.Z.'s statement is deemed correct, it is logical to conclude that the complainant would, beyond mere theory, risk torture if returned to China. The State party failed to properly consider the complainant's protection visa application and has violated article 3 of the Convention by failing to

conduct an effective, independent and impartial investigation of the merits of her claims for a protection visa.

Additional submissions from the State party and from the complainant

6.1 In a Note Verbale dated 11 October 2013, the State party dismissed the complainant's claim that it failed to properly investigate her claims or to verify the evidence she had presented. It recalls that the burden of proof that there is a foreseeable, real and personal risk of torture rests on her. Furthermore, the complainant enjoyed legal counsel for the preparation of her protection visa application and for her most recent application for ministerial intervention.

6.2 The State party submits that it did take steps to verify the hospital report by engaging a Mandarin-speaking officer. However, even if the hospital report was correct, it did not constitute evidence that the injury to her left index finger was linked to her being tortured as a result of her activities as a Tien Tao practitioner so as to fall within the purview of the definition of torture under article 1 of the Convention. Furthermore, the facts did not indicate that she would risk being tortured if returned to China.

6.3 Regarding L.D.Z.'s statement, the State party submits that the statement had not been sworn or affirmed before a person authorized to witness signatures, such as a lawyer or justice of the peace, that the contents were true. The same information was provided in a statement signed by L.D.Z. that was submitted with the complainant's applications for ministerial intervention in 2010 and 2011. The information was found not credible and it did not constitute evidence that the complainant was of interest to the Chinese authorities or that she had been harassed by them due to her religious beliefs. Moreover, the RRT was not convinced that the complainant was a Tien Tao practitioner in China. For all those reasons, the State party submits that L.D.Z.'s statement does not support the complainant's claims that she would risk being tortured if returned to China.

6.4 The State party further dismisses the complainant's claim that decisions on merits are not reviewable in Australia and recalls that the RRT reviewed and dismissed the complainant's claim on the merits, including her revised claims that she would risk being tortured if returned to China owing to her being a Tien Tao practitioner. Furthermore, the complainant's claims were considered by the Immigration Department on three different occasions in the context of her applications for ministerial intervention.

6.5 The State party rejects the complainant's assertion that little is known about the treatment of Tien Tao practitioners in China. Both the Immigration Department and the RRT relied on various sources of information in order to assess the credibility of the complainant's claims. Based on that information and evaluation of the evidence that the complainant provided, they concluded that the complainant was not a Tien Tao practitioner in China, nor was she harassed or harmed by the Chinese authorities because of her religious beliefs.

7.1 On 18 February 2014, the complainant rejected the State party's assertion that the burden of proof rests on her. She recalls that the requirement is for the complainant to provide substantial grounds to prove that there is a personal risk of being subjected to torture. In that regard, she states that she provided the Committee with a statement signed by L.D.Z., dated 31 January 2013, and the original medical report with an accredited translation. Those documents constitute sufficient evidence that she would risk being subjected to torture if returned to China. Thus, the above-mentioned requirement has been met.

7.2 The complainant further stresses that the State party has not addressed her claim that she was given misguiding advice by the migration agent before benefitting from legal counsel to prepare her protection visa application.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any complaint submitted in a communication, the Committee against Torture must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

8.2 The Committee recalls that, in accordance with article 22, paragraph 5 (b), of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that in the instant case, the State party has recognized that the complainant has exhausted all available domestic remedies. As the Committee finds no further obstacles to admissibility, it declares the communication admissible.

Consideration of the merits

9.1 The Committee has considered the communication in the light of all the information made available to it by the parties concerned, in accordance with article 22, paragraph 4, of the Convention.

9.2 The issue before the Committee is whether the removal of the complainant to China would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or to return (*refouler*) a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to China. In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would return.

9.3 The Committee recalls its general comment No. 1 (1997) on the implementation of article 3 of the Convention, according to which, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being "highly probable",[3] the Committee notes that the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a "foreseeable, real and personal" risk. The Committee further recalls that under the terms of general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned, while at the same time it is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

9.5 With respect to the risk that the complainant might be subjected to torture at the hands of Governmental officials upon return to China, the Committee notes the complainant's claim that she was arrested and beaten by the police because she was a Tien Tao practitioner. However, the Committee also notes the State party's submission that the RRT was unable to verify the complainant's identity, as she had used different names and

[3] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44 and Corr.1), annex IX, para. 6.

identity documents in her protection visa application and in the RRT application; and that the complainant had claimed to be a Tien Tao practitioner only after she had withdrawn her claim that she was a Falun Gong practitioner. The Committee recalls that, under general comment No. 1 (para. 5), the burden to present an arguable case lies with the author of a communication. In this connection, irrespective of the question regarding the complainant's affiliation with the Tien Tao religion, the Committee is of the view that she has failed to submit convincing evidence to substantiate her claim that she would be in danger of being subjected to torture were she to be returned to China.

10. Accordingly, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the complainant's removal to China by the State party would not constitute a breach of article 3 of the Convention.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]